

International Association



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## SEA Act Provisions within the SECURE Act Effective for Moving Administration Energy Agenda Forward

### Situational Analysis

- The International Association of Geophysical Contractors (IAGC) endorses the Streamlining Environmental Approvals Act of 2017 (SEA Act) as contained within the “Strengthening the Economy with Critical Untapped Resources to Expand American Energy Act” or the “SECURE American Energy Act,” as it provides a much-needed common-sense approach to ensure offshore energy exploration can move forward in a timely and efficient manner.
- In 2017, marine mammal populations—specifically whales—are stable. In many cases, they are increasing. Additionally, no correlation or causation exists between geo-exploration and decreases in marine species stocks.

### Three Things to Know

- The SEA Act ensures that government agencies adhere to a timeline for decision-making. It sets a clear framework for authorizations to be accepted or denied by the Secretary of the Commerce (or Interior, depending on legislation). The Secretary has 120 days after an application has been deemed complete to issue or deny the authorization allowing for activity to begin. If this does not happen, the authorization will be deemed approved on the terms stated in the application.
- The SEA Act will remove duplicative work and thus increase government efficiency. Marine mammals currently under protection of the Marine Mammal Protection Act (MMPA) of 1972 would be exempt from additional and less rigorous standards of the Endangered Species Act of 1973, removing the need of involving two government agencies without negative impacts on the species populations.
- The SEA Act will update and more clearly define the language from the MMPA, which was enacted to address significant declines in some species of marine mammals caused by human activities at the time. The MMPA was not intended to regulate sound in the marine environment. Additionally, the terms in the act have been determined in the courts, and the language used in the original act does not provide clear direction and application to the geophysical industries.

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## Enhancing the Marine Mammal Protection Act

### Situational Analysis

- The International Association of Geophysical Contractors (IAGC) endorses modifications to the Marine Mammal Protection Act (MMPA) because of the existing law's shortcomings and suggests recommendations for modernization.
- Last amended in 2003, the MMPA of 1972 was enacted in response to increasing concerns that significant declines in some species of marine mammals were caused by human activities. However, the origins of the MMPA were not rooted in concerns over sound and seismic surveys; yet the geophysical industry is regulated under the act.

### Three Things to Know

- In the early 1970s, the congressional intent behind the MMPA was cutting edge and forward-thinking. Decades of regulation and litigation, however, have exposed some significant flaws in the MMPA. Fixing these flaws would increase regulatory efficiency, decrease uncertainty, and ultimately benefit all stakeholders, the implementing agencies and the marine mammals. Because the language used in the original act does not provide clear direction and application to the geophysical industries, the MMPA language and intent have been determined in the courts.
- In 2017, marine mammal populations—specifically whales—are stable. In many cases, they are increasing. Additionally, no correlation or causation exists between geo-exploration and decreases in marine species stocks.
- Seismic and other geophysical surveys have been safely conducted in the United States and around the world for more than 50 years. These surveys are the first critical step to better understanding the resources base of the outer continental shelf. The surveys provide information to policymakers and regulators to make informed decisions, based on the best scientific evidence and available data.

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## **Application to Industries**

- Vague terminology in the law has led to the application of the MMPA to the geophysical industry, specifically sound in the marine environment. However, the original intent of the act was to address significant declines in some species of marine mammals caused by human activities, such as overhunting, overfishing and unscrupulous trade. It was not designed to regulate something as complex as sound in a marine ecosystem.
- The decades of regulation and litigation have exposed some significant flaws in the MMPA. Redefining terms and providing clear and defined terms in the MMPA would increase regulatory certainty, decrease inefficiencies, and ultimately benefit all stakeholders and implementing agencies.
- Modernizing the MMPA would enable efficient and effective application of the act to a more defined set of industries, in line with advances in technology and updated data that reflect the long track record of safe, responsible seismic industry operations around the world.

## **The MMPA & the Geophysical Industry**

- The advancements in technology, from 1972 to 2003 to the present, are similar to imaging advancements in medical profession uses for the human body and present an equitable low-level of risk to the marine life.
- Today's seismic technology pinpoints the most fruitful areas for hydrocarbon potential and contributes to reducing the overall environmental footprint associated with energy exploration, thus reducing inefficient practices and improving operational risks.
- Harassment, as defined by the MMPA, is any act or pursuit of, torment or annoyance to marine mammals. The application of the term "harassment" in geophysical exploration is not in line with modern techniques and technological advancements of the industry for safely conducting geophysical and seismic surveys.
- As the Bureau of Ocean Energy Management (BOEM) and the National Marine Fisheries Service (NMFS) have continually stated time and time again—throughout changing political administrations—to date, *there has been no documented scientific evidence of noise from acoustic sources used in seismic activities adversely affecting marine animal populations or coastal communities* (Source: BOEM, August 22, 2014 Science Note).
- Seismic and other geophysical survey activities are temporary and transitory; they are the least intrusive way to explore the earth's geology and its dynamic processes that impact human lives.

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## Recommendations for Modernization of the MMPA Standards

- The MMPA permits the authorization of incidental take by harassment.
  - **Today's MMPA:** The definition of "harassment" is overly broad and ambiguous, and it confusingly refers to "potential" harassment rather than actual harassment. This results in serious problems in the estimation of incidental take and unrealistic assumptions by the implementing agencies.
  - **Solution:** Redefine "harassment" to remove the word "potential" and to establish a more specific standard that provides better clarity for the agencies and the regulated community.
- To issue an incidental take authorization under Section 101(a)(5) of the MMPA, the agency must show that the authorization will have no more than a negligible impact on marine mammal populations and result in only small numbers of incidentally taken animals.
  - **Today's MMPA:** "Negligible impact" is not clearly defined; "small numbers" is not defined at all; and significant overlap exists between these two ambiguous standards. These problems have led to regulatory uncertainty, inconsistent application by agencies, and much litigation.
  - **Solution:** Create a redefined unambiguous "negligible impact" standard, and eliminate the "small numbers" requirement. A single, clear standard for authorizations would result in regulatory efficiency and predictability.
- To issue an incidental take authorization, the agency must require "other means of affecting the least practicable impact." These "other means" typically take the form of mitigation measures included as conditions of the authorization.
  - **Today's MMPA:** "Least practicable impact" is not defined in the statute or in the implementing regulations. As a result, it is not consistently applied by agencies. Little guidance is given to the regulated community, and, most recently, the phrase has been unreasonably interpreted by the Ninth Circuit Court of Appeals.
  - **Solution:** Create a new, clear definition for "least practicable impact." The definition should state that operational concerns and economic feasibility are primary factors in determining what mitigation is "practicable."

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## **Recommendations for Modernization of the MMPA Processes**

- The process for issuing incidental take authorizations is routinely delayed by the implementing agencies. The current procedural requirements create little accountability for agencies because they are either ambiguous or establish no consequences or solutions for unreasonably delayed agency action.

**Solution 1:** Revise the procedural requirements to set clear and firm deadlines for each stage of the permitting process, and establish consequences for when agency deadlines are not met. See proposed SEA Act of 2017 (Sec. 110) provisions within the SECURE Act, which sets a framework of 120 days (after an IHA application has been deemed complete) to issue or deny the authorization, allowing for activity to begin. If this does not happen, the authorization will be deemed approved on the terms stated in the application.

**Solution 2:** Create a streamlined authorization process for certain low-effect, but common, activities (similar to the nationwide permit process under the Clean Water Act).

- The MMPA creates a five-year limit on “incidental take regulations” that requires applicants to petition for a new set of regulations every five years. This results in unnecessary and burdensome administrative processes that create frequent delays and opportunities for litigation.

**Solution:** Remove the five-year limit or, alternatively, create a simple and straightforward five-year renewal process.

## **Closing**

- Seismic surveying is a well understood, safe industry practice that informs policy decisions regarding offshore energy development that can only be made with these evaluations provided by the industry’s technology and data.
- The members of the IAGC urge changes to the MMPA to clarify existing language, enable timely application decisions and modernize to reflect technological advancements.
- Member support of MMPA modernization is rooted in more than five decades of extensive worldwide seismic surveying. Scientific research demonstrates that the risk of direct physical injury to marine mammals is extremely low, and no scientific evidence demonstrates biologically significant negative impacts on marine life populations. Thus, practical reform equates to practical application and continued minimal effects to marine mammals from the geophysical and seismic industries.

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